No. 76-483

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERTO AYO-GONZALEZ, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 536 F. 2d 652. The district court's findings of fact and conclusions of law in the forfeiture action are set forth at Pet. App. 37a-40a.

JURISDICTION

The judgments of the court of appeals (Pet. App. 33a-34a) were entered on August 6, 1976. The petition for a writ of certiorari was filed on October 5, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with the Due Process Clause, the master of a foreign vessel may be held criminally liable under 16 U.S.C. 1081 without proof that he acted negligently in fishing within the prohibited zone.

2. Whether, consistent with the Due Process Clause, a foreign vessel may be forfeited for fishing within the prohibited zone, in violation of 16 U.S.C. 1081, without proof that the owner or its agents acted negligently.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

16 U.S.C. 1081, 1082, 1091, and 1092 are set forth at Pet. App. 43a-45a. The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property without due process of law; * * *.

STATEMENT

On August 2, 1975, the United States Coast Guard Cutter *Point Baker* was on patrol out of Port Aransas, Texas. Personnel on the *Point Baker* sighted Cuban Vessel E-82 fishing at a point which the navigation officer of the *Point Baker* determined to be approximately 7.5 miles from the nearest land of the United States, St. Joseph Island, Texas (Pet. App. 38a). The *Point Baker* ordered the E-82 to stop; it dropped anchor seventeen minutes after it was first sighted. The navigation officer of the *Point Baker*, using radar and soundings, then determined the position of the *Point Baker* to be approximately 8 ¼ miles from St. Joseph Island (Pet. App. 38a-39a). A Coast Guard aircraft confirmed the position (Pet. App. 8a). A small boat was launched from the *Point Baker* with a boarding party of four, and the E-82 was

boarded. Petitioner Ayo-Gonzalez identified himself as the Cuban ship's captain. The E-82's navigational equipment consisted of a chronometer, fathometer, sextant, compass, tables and charts (Pet. App. 7a, 9a). The boarding party from the *Point Baker* discovered that in addition to the catch of marine life in the trawl nets, which were pulled in just before the boat dropped anchor, seven baskets of headed shrimp were on board (Pet. App. 8a).

In a consolidated trial, petitioner Ayo-Gonzalez[1] was convicted of fishing within the fisheries zone contiguous to the territorial sea of the United States, in violation of 16 U.S.C. 1081, and the United States was awarded a judgment of forfeiture on a libel *in rem* charging the vessel with the same illegal act. Ayo-Gonzalez was sentenced to one year of unsupervised probation. The court of appeals affirmed.

ARGUMENT

This is not a case warranting review by this Court. There is no conflict in the courts of appeals regarding the standard of criminal liability under 16 U.S.C. 1081. As the court below stated, before this decision the issue had "not been addressed in any reported decision" (Pet. App. 15a). The questions presented here concerning the standard of criminal liability under 16 U.S.C. 1081 are not of recurring public importance; the statute has been repealed effective March 1, 1977. See Pub. L. 94-265, 94th Cong. (April 13, 1976) ("The Fishery Conservation and Management Act of 1976"). In any event, the decision below is correct.

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[1]Ayo-Gonzalez waived his right to a jury trial.

1. The prohibition in 16 U.S.C. 1081 is clearly stated: "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within * * * any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters * * *." The evidence established (Pet. App. 9a-10a) that the vessel in this case was foreign, that petitioner Ayo-Gonzalez was its master, that it was engaged in the fisheries and that it was within the relevant waters, that is, within nine nautical miles from the seaward boundary of the territorial sea. See 16 U.S.C. 1091, 1092. The statute required no further proof.

Petitioner's contention (Pet. 16-17) that the government must prove negligence gains no support from the language of 16 U.S.C. 1081 or its legislative history and the court of appeals correctly rejected the argument. The court's careful and thorough review of the relevant materials (Pet. App. 20a-27a) demonstrates that Congress did not intend negligence to be an element of the offense. See also Fidell, *Ten Years Under the Bartlett Act: A Status Report on the Prohibition on Foreign Fishing*, 54 Boston U.L. Rev. 703, 736-737 (1974). In reporting on 1970 amendments to 16 U.S.C. 1081 *et seq.*, for example, the Senate Commerce Committee noted that it had rejected a proposal to establish a mandatory minimum fine because it would have failed to provide flexibility in dealing with "unintentional violations caused by minor errors of navigation." S. Rep. No. 91-1320, 91st Cong., 2d Sess. (1970). Petitioners are unable to cite any contrary legislative history.

2. Petitioners contend that the Due Process Clause prohibits the imposition of criminal liability in the absence of proof that the offender (here Ayo-Gonzalez) had "personal culpability" amounting at least to negligence

(Pet. 8). Such contentions have been rejected by this Court in numerous decisions. See, *e.g.*, *United States* v. *Park*, 421 U.S. 658; *United States* v. *Freed*, 401 U.S. 601; *United States* v. *Dotterweich*, 320 U.S. 277; *United States* v. *Balint*, 258 U.S. 250. In *United States* v. *Dotterweich, supra*, 320 U.S. at 280-281, the Court upheld

> * * * a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the required conventional requirements for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. * * *

Similarly, in *United States* v. *Balint*, *supra*, 258 U.S. at 252, the Court noted that "[m]any instances of this [type of legislation] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes * * *."[2]

Petitioners' contention that under *United States* v. *Park*, *supra*, criminal liability must at least be based on negligence is erroneous. In *Park*, the Court upheld

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[2]See also *Holdridge* v. *United States*, 282 F. 2d 302, 310 (C.A. 8) (Blackmun, J.):

> [W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause. * * *

the conviction of the chief executive officer of a large national food chain based on proof that some of the food held for sale by one of the chain's warehouses was adulterated in violation of 21 U.S.C. 331(k). The Court reaffirmed the principle that criminal liability may attach to those who have "'a responsible share in furtherance of the transaction which the statute outlaws.'" 421 U.S. at 670 (quoting from *United States* v. *Dotterweich*, *supra*, 320 U.S. at 284). The Court held that the liability of such person does "not depend on their knowledge of, or personal participation in, the act made criminal by the statute. * * * It [is] enough * * * that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of." 421 U.S. at 670-671. Where, however, the facts demonstrate that the defendant was without *power* to prevent the acts in question, the Court held that the Federal Food, Drug and Cosmetic Act would not impose liability. 421 U.S. at 673.

As *Park* and other decisions of this Court demonstrate, the Due Process Clause is not violated when a defendant is convicted regardless of whether he acted negligently—that is, whether he failed to act as a reasonably prudent man would act.[3] If, by virtue of his position and responsibility, he had "the power to prevent the act complained of," that is a sufficient basis for conviction. Here Ayo-Gonzalez was master of the fishing vessel and, as the court of appeals observed (Pet. App. 31a):

[3]The Court's statements that the statute considered in *Park* "requires the highest standard of foresight and vigilance" (421 U.S. at 673), and that such a standard is "demanding, and perhaps onerous" (*id.* at 672), reflect that ordinary negligence is not a prerequisite to liability. The same conclusion is reflected in the Court's statement in *Dotterweich*, *supra*, 320 U.S. at 281, that liability may attach to a person "*otherwise innocent* but standing in responsible relation to a public danger" (emphasis supplied).

> A ship's master * * * has virtually plenary authority over his vessel and her crew. Therefore, proof that a defendant is the "master or other person in charge of" a fishing vessel necessarily establishes that he had the authority and responsibility to insure compliance with the law.

3. Petitioners challenge the forfeiture action on the same statutory and constitutional grounds upon which they challenge the conviction of Ayo-Gonzalez. The court of appeals correctly ruled that "[t]he elements of a section 1082(b) forfeiture action are the same as those of a section 1082(a) criminal action, except, of course there is no issue of the identity of the master since the proceeding is one in rem. All elements were proved beyond a reasonable doubt" (Pet. App. 32a). In these circumstances forfeiture is permissible and not unduly burdensome, particularly when the owner of the vessel stands to benefit directly by the conduct for which the vesel is forfeited. Cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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